

DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR
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October 16, 2003

Diana Limon, Compliance Officer
International Brotherhood of
Electrical Workers, AFL-CIO
P.O. Box 2500
Pasadena, CA 91102-2500

Re: Public Works Case No. 2003-028
Baldwin Park Marketplace Project
City of Baldwin Park

Dear Ms. Limon:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to Title 8, California Code of Regulations, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable state law, it is my determination that the Baldwin Park Marketplace Project ("Project") is a public work subject to the payment of prevailing wages.

The Project involves the redevelopment of 24 acres of land ("Site") in the City of Baldwin Park ("City"), pursuant to a Disposition and Development Agreement ("DDA") effective October 3, 2001 between the Redevelopment Agency of City ("Agency") and Lewis Investment Company ("Developer"). Under the DDA, Agency is to acquire the various parcels comprising the Site by negotiated sale or eminent domain proceedings, and then convey title to the Site to Developer.¹ Developer is to develop the Site into approximately 260,000 square feet of retail and commercial space, including a "big box" retail store. The big box store contemplated under the DDA is Wal-Mart. According to City's website, the Project will also include six satellite pads for restaurants, shops and a gas station. Under the DDA, Developer is to undertake and bear the costs of constructing all on-site improvements.

¹ Under the applicable law, the transfer of property for less than fair market value may under some circumstances constitute the payment of public funds for construction. Here, Developer paid Agency \$11 per square foot for the Site, for a total of \$11 million. According to an appraisal of the Site performed by Keyser Marston Associates dated July 16, 2001, \$11 per square foot is the fair market value. In light of the finding, however, that the Project was paid for with other public funds, we need not reach the question whether the Site was transferred for fair market value.

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Under the DDA, Agency agreed to undertake and bear the costs of relocation, demolition and rough grading/clearance. In 2002 and 2003, Agency bid the demolition and rough grading/clearance work to a variety of contractors on a prevailing wage basis.

Agency also agreed to undertake the design, planning, construction and installation of off-site infrastructure improvements, mutually identified by Developer and Agency as necessary to the Project. To this end, Agency and Developer entered into an agreement regarding the off-site improvements, effective December 27, 2001. Under section II (A)(1)(a), off-site improvements "shall include the installation, construction, and if necessary, repair of all street improvements, utilities, traffic signalization, storm drain improvements, and all other improvements, facilities, and utilities (including, without limitation, the provision of water utility service sufficient to support the retail development anticipated by Developer as part of the Project) that are, or will be required The Off-Site Improvements shall include, but are not limited to, those improvements described in Exhibit 'A'." Exhibit A identifies construction of street improvements along Big Dalton Avenue and Merced Avenue, installation of street signals and provision of utilities to within five feet of the boundaries of the Site as "illustrative" of the type of off-site improvements that will be required in developing this Project.

The total cost of the off-site improvements is estimated at \$1,418,000, of which Developer agreed to contribute \$500,000 as its fair share. Agency is to pay the balance of \$918,000. Agency's funding sources include a \$709,000 off-site improvement grant from the United States Department of Commerce Economic Development Administration. City has already entered into two contracts, one for street reconstruction and the other for traffic signal installation, which specify that the work is federally funded and therefore subject to prevailing wage obligations under the federal Davis-Bacon Act.²

² Federally funded projects are governed by Title 8, California Code of Regulations, section 16000(b). When a federally funded project is carried out or controlled by a California awarding body, such as a city, the state prevailing wage rates apply if higher. Here, because the City is carrying out the contracts, state prevailing wage rates apply.

According to Agency's 33433 Report, total Agency costs to implement the DDA equal \$22,776,598. Of this amount, Developer is to pay \$11,000,000 to purchase the Site and \$500,000 towards the costs of constructing the off-site improvements. Agency has yet to convey the Site to Developer for construction of the marketplace.

Under what is now Labor Code³ section 1720(a)(1) (as amended by statutes of 2001, chapter 938, section 2 (Senate Bill 975)), a public work is defined as "[c]onstruction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds." The Project involves construction, alteration, demolition and repair. The work is to be performed under contract. Developer, however, argues that no public funds went into the Project.

Developer admits that public funds were expended on the on-site land assembly and preparation work (relocation, demolition and rough grading/clearance) as well as on the off-site infrastructure improvements. According to Developer, though, Agency performed the on-site land assembly and preparation work as part of the real estate transaction, not as part of the Project. Developer also contends that the off-site infrastructure work is a separate project and should not convert an otherwise privately financed construction project into a public work.⁴ Underlying Developer's argument is the proposition that the Project is actually three separate projects, one for the on-site land assembly and preparation work, another for the off-site infrastructure work, and the third for the construction of the on-site marketplace improvements. For the reasons set forth below, I find that the Project is a single interdependent and integrated public works project.

³ Unless otherwise indicated, all subsequent statutory references are to the Labor Code.

⁴ Developer also contends that by contributing \$500,000 toward the cost of the off-site infrastructure improvements, Developer paid its allocable share. As Developer acknowledges in arguing in favor of applying the exemption under Section 1720(c)(2), discussed *infra*, the off-site infrastructure work was required as a condition of regulatory approval of the Project. As such, Developer's attempt to segregate out that portion of the off-site infrastructure work attributable to the Project from that attributable to other sources is rejected.

Developer correctly observes that the relevant precedential decision is *Vineyard Creek Hotel and Conference Center/Redevelopment Agency, City of Santa Rosa*, PW 2000-016 (October 16, 2000). As stated in *Vineyard Creek*:

The determination whether a construction undertaking is one project or a series of separate projects must be done on a case-by-case basis. Nevertheless, a variety of factors must be considered, including: (1) the manner in which the construction is organized in view of, for example, bids, construction contracts and workforce; (2) the physical layout of the project; (3) the oversight, direction and supervision of the work; (4) the financing and administration of the construction funds; and (5) the general interrelationship of the various aspects of the construction. A finding that a construction undertaking is either a single project or a series of separate projects is relevant in determining the extent to which prevailing wage obligations apply. In making this finding, it is the analysis of the above factors, not the labels assigned to the various parts of the project by the parties, which control.

Turning to the facts here, with regard to the first factor, the Developer has not yet constructed the on-site marketplace improvements and therefore the specifics of that construction are not yet known. The DDA makes clear, however, that the Agency and Developer are to work in a coordinated fashion to carry out the construction of all parts of the Project. Agency's demolition work is to proceed pursuant to Developer's engineering reports. The off-site infrastructure improvements, which include water, sewer, drainage, electrical, telephone and gas, are to be built with sufficient size and capacity to service the operation of the marketplace. To accomplish this, "[t]he parties shall cooperate in the identification, design and construction of the off-site improvements necessary to service the site. Once the off-site improvements have been mutually identified, they shall be included in the off-site Development Agreement ... Agency shall be responsible for the actual construction of the off-site improvements." (DDA, p. 25.) As to the construction of the on-site marketplace improvements, "the Developer, its supervising architect, engineer and contractor shall work with Agency staff to coordinate the overall design, architecture and color of the improvements on the site." (DDA, p. 71.) Thus, construction is organized in a coordinated and integrated fashion.

As to the second factor, the physical lay-out of the Project, all parts of the Project are physically integrated. The on-site land assembly and preparation work undertaken by Agency and the construction of the on-site marketplace improvements by Developer are to be performed on the same 24-acre Site. Agency is preparing the land so that the Developer may construct upon it the marketplace improvements. The Site will be served by the off-site infrastructure work undertaken by Agency. The street and signal improvements will improve traffic around the marketplace, and the utility work will provide necessary service to the marketplace. Thus, each of the parts - the land assembly and preparation, the off-site infrastructure improvements and the on-site marketplace improvements - is integral to the Project as a whole. See also, *Development of River Street Historic District*, PW 2001-016 (May 6, 2002); and *Soledad Canyon Center Shopping Center*, PW 2001-044 (September 26, 2002).

As to the third factor, Project oversight, Agency has approval authority over preliminary architectural and on-site development plans, landscape plans and exterior elevations, and changes to the plans. The on-site demolition and rough/grading clearance work performed by Agency is subject to Developer's soils engineer's report, recommendations and supervision. Also, Developer is to design and submit to Agency for Agency's approval a sign plan for the design of the signage to be installed and constructed at the site. Thus, integration of the parts of the Project is further demonstrated by Agency's involvement in Developer's work and Developer's involvement in Agency's work.

As to the fourth factor, Project funding, the privately funded construction of on-site marketplace improvements draws a distinct advantage from the expenditure of public funds on the necessary prerequisites - relocation, demolition, rough grading/clearance and off-site infrastructure improvements. The parties acknowledge the importance of the public subsidies to the overall Project as follows: "Developer recognizes ... (2) The substantial public aids that have been made available by law and by government for the purpose of making such development possible." (DDA, p. 4.)

Finally, as to the general interrelationship of the various parts, the discussion concerning the first four factors establishes that the various construction undertakings comprise a single interdependent and integrated project that is not severable into private and public parts. Consequently, the Project is paid for with public funds and thereby constitutes a public work.

Developer next argues that the following exemption from prevailing wages within the Senate Bill 975 amendments to Section 1720 apply to the Project:

If the state or a political subdivision requires a private developer to perform construction, alteration, demolition, installation, or repair work on a public work of improvement as a condition of regulatory approval of an otherwise private development project, and the state or political subdivision contributes no more money, or the equivalent of money, to the overall project than is required to perform this public improvement work, and the state or political subdivision maintains no proprietary interest in the overall project, then only the public improvement work shall thereby become subject to this chapter. Section 1720(c)(2).

Developer's assertion is without merit for two principal reasons. First, the Senate Bill 975 amendments became effective on January 1, 2002. In redevelopment cases, the Department has consistently looked to the date of the development agreement to determine the applicable law. In this case, the DDA was entered into on October 3, 2001, prior to the effective date of the Senate Bill 975 amendments. Therefore, the version of Section 1720 in effect prior to the passage of Senate Bill 975 controls. Because the law at the time did not contain the above-referenced provision, it is unavailable here to exempt the Project from prevailing wage requirements.

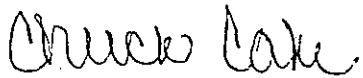
Even if the Senate Bill 975 amendments were to apply, Developer would not meet the criteria for exemption from coverage under Section 1720(c)(2). Pursuant to the DDA, Agency, not Developer, was required to undertake the off-site infrastructure improvements. City awarded it through a bid selection process to various private contractors. Further, Agency contributed more money to the overall Project than was required to construct the off-site infrastructure improvements. Agency also paid for work that does not constitute improvements such as land assembly and preparation work, including the costs of relocation, demolition and rough grading/clearance.

In summary, the Baldwin Park Marketplace Project is a single public works project that is not exempt from the requirement to pay prevailing wages.

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I hope this determination satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in cursive script that reads "Chuck Cake".

Chuck Cake
Acting Director

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